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Teresa Marrero
Senior Attorney

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-3810

March 27, 2001

Ex Parte Presentation

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket Nos. 98-147 and 96-98

Dear Ms. Salas:

In this letter, AT&T Corp. ("AT&T") briefly responds to two recent *ex parte* letters filed in the above-captioned proceeding. The first letter, filed by Qwest Communications International Inc. ("Qwest") and Mpower Communications, Inc. on March 5, 2001 ("Qwest Letter"), sets forth two proposals: (1) to simplify collocation provisioning by establishing a rebuttable presumption that equipment placed in the first 100 square feet of collocation space satisfies the statutory prerequisites for collocation, and (2) to forbear from enforcing Section 252(i)'s "pick and choose" rule to collocation arrangements established through voluntary agreements. The second letter, filed presumably on behalf of SBC Communications Inc. ("SBC")[1] on March 9, 2001 ("SBC Letter"), deals with the scope of the nondiscrimination requirement of § 251(c)(6).

Qwest Letter

1. The Qwest Letter proposes to establish a "simplified" collocation process, in which there is a "rebuttable presumption that the first 100 square feet of caged or cageless collocation space requested by a CLEC in a Central Office meet the requirements for collocation." Qwest Letter at 2. For the first 100 square feet, the CLEC

[1] The letter, signed by Michael K. Kellogg, counsel for SBC and other incumbent LECs, does not indicate the party on whose behalf it is filed.

would "certify that the equipment placed in the collocation space is necessary for competitively meaningful interconnection or access to UNEs" and that it complies with NEBS (and ANSI T1.413 Annex E when used for line sharing or line splitting). *Id.* Beyond the first 100 square feet, however, the CLEC would be permitted to collocate the equipment only if it is "on the ILEC's approved product list." *Id.*

AT&T fully supports real efforts to simplify the collocation process, which Qwest and other incumbent LECs have long abused to impede local competition. As AT&T has explained in its comments in this proceeding, the way to accomplish that is to establish clear Commission rules that broad categories of commonly-used functionalities are necessary for interconnection or access to network elements. Qwest's specific proposal, however – to limit a CLEC's ability to collocate the full range of statutorily-authorized equipment to the first 100 square feet of collocation space, with the CLEC limited to an ILEC list of approved equipment in any additional space – has no basis in either law or policy. Any such limitation would be flatly inconsistent with the plain terms of § 251(c)(6), which require incumbent LECs to provide collocation on any available "premises" (not limited to 100 square feet). *See, e.g., GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 424-25 (D.C. Cir. 2000) (LEC must provide collocation on adjacent property when space in central office exhausted). The statute gives CLECs the flexibility to expand their collocation space as competitive conditions warrant. By contrast, the Qwest Letter proposal would give incumbents the authority either to block such expansion outright or to extract discriminatory payments. Such a policy would frustrate implementation of the statute and would impede competition.[2]

Moreover, Qwest's proposal, coupled with its loose and nebulous definitions of "necessary" (*see* Qwest Letter at 1), comes dangerously close to saying simply that "anything goes" in the first 100 square feet of collocation. In this remand proceeding, the Commission must ensure that it adequately responds to the Court's insistence that the rules implementing § 251(c)(6) give proper effect to the statutory limitation on equipment that may be collocated. In its Comments and Reply Comments, AT&T has proposed a rigorous definition of "necessary" that is fully consistent with the statute and the caselaw. *See* AT&T Comments at 11-17; AT&T Reply Comments at 13-20. Moreover, AT&T has offered extensive evidence – unrebutted in this proceeding – that broad categories of functionalities (*e.g.*, transmission, switching, and surveillance) plainly are "necessary" for interconnection and access to unbundled network elements. *See* AT&T Comments at 20-32; AT&T Reply Comments at 27-35. AT&T has also shown that, under certain circumstances, an ILEC's refusal to permit collocation of multi-function equipment that includes other functionalities would constitute a discriminatory term and condition of collocation, in violation of § 251(c)(6). *See, e.g.*, AT&T Reply Comments at 20-26. In short, the Commission should simplify the collocation process

[2] As it has previously explained, AT&T does not oppose reasonable size limitations designed to protect the interests of both ILECs and CLECs in the efficient use of central office space, by, for example, restricting collocation of extremely large equipment. *See* Letter from Teresa Marrero (AT&T) to Magalie Roman Salas (FCC), dated February 21, 2001, at 5; Qwest Letter at 2.

with clear rules that delineate broad categories of functionalities that are necessary for interconnection and access to network elements, rather than through a "100 square feet" presumption that would almost certainly be challenged as both arbitrary and inconsistent with the § 251(c)(6).[3]

2. Qwest's proposal that the Commission forbear from enforcing § 252(i)'s "pick and choose" rule for voluntary agreements on collocation arrangements is entirely meritless. Qwest does not even attempt to make the sort of showing that would be necessary for forbearance under the standards of Section 10(c). *See* 47 U.S.C. § 160(c). But even if forbearance were an option in this context, it would not promote competition, as Qwest asserts. As the Commission has found, § 252(i) is a "primary tool of the 1996 Act for preventing discrimination under section 251." *Local Competition Order* ¶ 1296. Qwest argues that forbearance would allow it to enter into "innovative" collocation arrangements more readily, but in fact forbearance would frustrate competition by permitting the ILEC to use its superior bargaining power to discriminate among CLECs and to impose additional costs on selected CLECs seeking the same "innovative" arrangements.

SBC Letter

The SBC Letter responds to AT&T's *ex parte* letter of February 21, 2001 ("AT&T Letter"), in which AT&T explained that, under certain circumstances, § 251(c)(6) requires an incumbent LEC to permit a CLEC to collocate multi-function equipment that includes functions that might not, standing alone, be deemed "necessary" for interconnection or access to unbundled network elements.

SBC has *no* answer for AT&T's showing that, in many cases, a CLEC could not make use of indisputably "necessary" functions absent collocation of other functions that might not be deemed "necessary" on a stand-alone basis. *See* AT&T Letter at 2-3. SBC simply mischaracterizes AT&T's argument and dismisses it. SBC Letter at 2 n.*.

SBC's attack on the § 251(c)(6) nondiscrimination requirement fares no better. The question of what functions may be integrated with "necessary" functions is a "term and condition" of collocation – as SBC has conceded. *See* Letter from Michael K. Kellogg (SBC) to Magalie Roman Salas (FCC), dated February 1, 2001, at 6. Congress expressly required such "terms and conditions" to be "nondiscriminatory." As AT&T explained, and as SBC cannot dispute, it is well-settled that the statutory term "nondiscriminatory" means nondiscriminatory as between the incumbent and the CLEC. *See* AT&T Letter at 3; *Local Competition Order* ¶¶ 218 ("[w]e believe that the term 'nondiscriminatory,' *as used throughout section 251*, applies to the terms and conditions an incumbent LEC imposes on third parties as well as itself" (emphasis added)).

[3] Qwest's proposal is vague in other respects as well. For example, Qwest does not specify what level of NEBS compliance would be required within the first 100 square feet, nor does it explain what would be involved in the ILEC "maintain[ing] the right to observe all collocation space to assure NEBs compliance." Qwest Letter at 2.

Therefore, if a LEC integrates such functions in its own network, any attempt to prohibit a CLEC from collocating integrated, multi-function equipment would be an unreasonable and discriminatory term and condition of collocation – especially when such equipment would fit easily within a standard-sized collocation cage.

SBC complains that the "AT&T theory" of "nondiscrimination" would require an ILEC to provide unbundled access to an element of its network that is not "necessary" within the meaning of § 251(c)(3) – "[s]ince the incumbent obviously has access to all of its own network elements." SBC Letter at 3. Mandating unbundling of an element that is not at all necessary, SBC points out, would impermissibly "expand the scope of the category within which" the nondiscrimination principle operates. Id. The situation here is, of course, quite different. The multi-functional equipment at issue *does, by definition,* perform functions that are "necessary" for interconnection and access to network elements. The only open question is whether incumbent LECs can insist – for no reason other than to impede competition – that CLECs disable other functionalities of that same equipment that might not, standing alone, satisfy the "necessary" criterion. In this narrow context, the nondiscrimination principle operates quite reasonably to prohibit such conditions whenever they would produce discrimination as between the incumbent LECs and CLECs.

Throughout this proceeding, when confronted with a statutory argument for which they have no response, SBC and the other incumbent LECs have claimed that the D.C. Circuit has already decided the issue in their favor, and SBC does so again here. *See* SBC Letter at 2. The Commission order under review in *GTE Serv. Corp.* did not rely on the § 251(c)(6) nondiscrimination language in requiring collocation of multi-function equipment, and no party argued that the Court should uphold the original multi-function equipment rule on the basis of the nondiscrimination requirement. *See* Joint Brief of Intervenors in Support of Respondents, pp. 10-13 (D.C. Cir., filed Nov. 29, 1999). Thus, the issue was not before the Court, and the Court did not pass on it. *GTE Serv. Corp.* v. *FCC*, 205 F.3d 416, 422-24 (D.C. Cir. 2000) (interpreting only the "necessary" language). Moreover, the Court expressly left open the possibility that some form of the FCC's original rule could be re-adopted on different grounds. *See id.* at 424.

Pursuant to Section 1.1206 of the Commission's rules, I have submitted two copies of this letter for inclusion in the record of each of the above-referenced proceedings.

Sincerely,

Teresa Marrero

cc: W. Kehoe III
B. Olson